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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 205, 206, 215, 219, 226, 232, 235, 252, and

Appendix I to Chapter 2

RIN 0750-AH45

Defense Federal Acquisition Regulation Supplement: Deletion of Text Implementing 10 U.S.C. 2323 (DFARS Case 2011-D038)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove language based on a statute that provided the underlying authority for DoD's Small Disadvantaged Business (SDB) program. This action is necessary because the statute has expired.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Judith S. Rubinstein, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 79 FR 61579 on October 14, 2014, to delete those DFARS sections that were based on 10 U.S.C. 2323, which has expired. 10 U.S.C. 2323 provided the underlying statutory authority for DoD's Small Disadvantaged Business (SDB) program, including the establishment of a specific goal within the overall 5 percent SDB goal for the award of prime contracts and subcontracts to historically black colleges and universities (HBCUs) and minority institutions (MIs). Because of the expiration of this authority, all DFARS sections based on this authority were deleted by the interim rule.

II. Discussion and Analysis

There were no public comments submitted in response to the interim rule. The interim rule has been converted to a final rule, without change.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

The objective of this rule is to amend the DFARS to remove or revise clauses, provisions, and guidance conditioned on section 1207 of the National Defense Authorization Act of 1987, Public Law 99-661, as codified at 10 U.S.C. 2323. Section 2323 of title 10 expired on September 30, 2009. However, prior to the implementation of the interim rule, the implementing regulations for this law still appeared in the DFARS. Implementation of this rule was needed to preclude the risk that DoD contracting officers would inadvertently issue a solicitation or execute a contract based on an acquisition strategy that is no longer authorized.

No public comments were submitted in response to the initial regulatory flexibility analysis, or in response to the interim rule, which was published in the Federal Register on October 14,

2014. Therefore, there were no issues to assess, and no changes to the rule were necessary.

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. This expectation is based on the following information and analysis:

The DoD Small Disadvantaged Business (SDB) program has not been in effect since fiscal year (FY) 2008. This rule does not change the fundamental procurement policies that DoD has used to achieve strong SDB participation or to encourage the involvement of historically Black colleges and universities and minority institutions in defense-related research, development, testing, and evaluation efforts. The following rationale is provided:

10 U.S.C. 2323 was the underlying statutory authority for DoD's small disadvantaged business (SDB) program. DoD's SDB program was intended to supplement and complement the Federal-wide SDB program authorized under the Small Business Act. It provided for the institution of a specific goal within the mandatory 5 percent SDB goal for the award of prime contracts and subcontracts to historically Black colleges and universities, minority institutions, and Hispanic-serving institutions. Section 2323 of Title 10 served as the basis for a number of unique acquisition techniques used by DoD to help it

achieve these goals, such as the price evaluation adjustment for SDBs in competitive procurements and the set-aside for historically Black colleges and universities and minority institutions. It was also the basis for the special 95 percent customary progress payment rate for SDBs.

Now that the law has expired, these special techniques can no longer be used. However, the impact of this change is mitigated by a number of factors. Preeminent among those factors is DoD's obligation to meet or exceed the expectations of the Small Business Act regarding SDBs, and to provide assistance for defense-related research, development, testing, and evaluation activities to historically Black colleges and universities and minority institutions.

Section 15(g) of the Small Business Act, Public Law 85-536, as amended, (15 U.S.C. 644(g)), requires all Federal agencies to make every attempt to achieve the annual Government-wide goal for participation by SDBs. The statutory SDB goal is not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. DoD must comply with this law, and it has. The Department has met or exceeded the 5 percent SDB goal since FY 2001.

DoD contracting officers can employ monetary incentives in solicitations and contracts, when inclusion of such incentives is, in the judgment of the contracting officer, necessary to

increase subcontracting opportunities for small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, women-owned small businesses, as well as small disadvantaged businesses. In addition, while the 95 percent progress payment rate is no longer allowable, SDBs, because they are small businesses, are still eligible to receive the 90 percent progress payment rate. Finally, the extent of participation of all small businesses, including small disadvantaged businesses, in performance of the contract is addressed during source selection for negotiated DoD acquisitions that are required to have subcontracting plans. The past performance of offerors in complying with subcontracting goals with all small businesses, including SDBs, is also evaluated in DoD acquisitions.

The capability and expertise that HBCUs and MIs bring to numerous DoD-funded research and development programs are valued commodities. DoD must explore new areas of science, mathematics, and engineering in order to develop the alternative technologies needed to fulfill its national security mission. HBCUs and MIs will continue to support DoD in these endeavors through their involvement in various research and development programs. This rule does not impose new reporting, recordkeeping or other compliance requirements.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 205, 206, 215, 219, 226, 232, 235, 252, and Appendix I to Chapter 2

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 205, 206, 215, 219, 226, 232, 235, 252, and Appendix I to Chapter 2, which was published at 79 FR 61579 on October 14, 2014, is adopted as a final rule without change.

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